17-379

Supreme Court of the United States.

No. 869.

THE DISTRICT OF COLUMBIA, Plaintiff in Error, *vs.* CHARLES H. ARMES, Administrator of Dubose.	In error to the Supreme Court of the District of Columbia.

On Motion to Dismiss the Writ of Error.

BRIEF OF ATTORNEY FOR DISTRICT OF COLUMBIA.

Globe Job Print.

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THE QUESTIONS MADE BY THE MOTION.

Motion alleges that the matter brought before this court is something other and less than a review of a final judgment of the court below.

It is not final, because the plaintiff in error did not appeal from the judgment of the Circuit Court to the General Term below, but from an order of the Circuit Court, refusing a motion for a new trial, and hence the Court in General Term had no other question before it.

No bond was given for the appeal.

THE ACTUAL CASE.

The following are the provisions of law regulating the matter of practice arising on the motion:

SECTION 803 If, upon the trial of a cause, an exception be taken, it may be reduced to writing at the time or it may be entered on the minutes of the justice, and afterward settled in such manner as may be provided by the rules of the court, and then stated in writing in a case or bill of exceptions, with so much of the evidence as may be material to the questions to be raised, but such case or bill of exceptions need not be sealed or signed.

SECTION 804. The justice who tries the cause may, in his *discretion*, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages; but such motion shall be made at the same term at which the trial was had.

SECTION 805. When such motion is made and heard upon the minutes an appeal to the general term may be taken from the decision, in which case a bill of exceptions or case shall be settled in the usual manner.

SECTION 806. A motion for a new trial on a case or bill of exceptions, and an application for judgment on a special verdict or a verdict taken subject to the opinion of the court, shall be heard in the first instance at a general term. (Revised Statutes of the United States, relating to the District of Columbia, pp. 95 and 96)

This court has settled the construction, (secs. 803–4–5,) in part at least. Among other things, it permits the ruling of the trial judge to be examined in the general term by parole in effect. The unsealed exceptions provided for that purpose may, however, become proper bills of exceptions for the purpose of transferring a case to this court.

Pomeroy vs. State Bank, 1st Wall., 592.
Thompson vs. Riggs, 5 Id., 663.
Pabst vs. Railroad, 2 McArthur, 42.

In this case the court, in its discretion, passed only upon the motion for a new trial upon its own minutes. This was March 13th.

The regular bill of exceptions and case were then settled by the parties and court, upon which the plaintiff in error filed a regular motion for a new trial, as also on appeal in the general term on the 21st of April following.

These exceptions included the case, under the ruling of the Supreme Court of the District, in a well-considered opinion by Mr. Justice Cox.

O'Neal vs. The Dist., 7th Wash. Law Reporter, 322.

What was the effect of this action upon the case?

First. In the first place the appeal from the decision of the special to general term must be held to carry with it the

whole case, otherwise a reversal by the general term would not reverse the judgment, as it certainly does. That is a question of little importance in this case.

No bond is necessary to an appeal. Rule 91 of the court below.

Second. The 806 section requires all motions for a new trial, on a case or exceptions, to be heard in the general term, where alone they can be heard in the first instance. Certainly this action of itself removes the whole case into the general term; and such is the practice and ruling of the Supreme Court of the District.

O'Neal vs. The Dist., 7 W. L. Rep., 332.
McPherson vs. Cox, Id., Id., 253.
Doddridge vs. Gaines, 1st McAr., 335.
Pabst vs. Railroad, 2 Id., 43.
Converse vs. Railroad, Id., Id., 504.

The case, *Sparrow vs. Strong*, 4 Wall., 584, can have no application to this case; for here the court below, by its own practice and ruling, had the whole case before it.

The case, *Wiley vs. Brown*, Id., 165, originated in the Orphans Court, where it alone could be finally disposed of.

Railway vs. Townbly decides that an exception not taken and urged below cannot be made effective in the reviewing court.

Clearly the motion must be refused.

A. G. RIDDLE,
For the District of Columbia.

17-379

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Supreme Court of the United States.

No. 273. OCTOBER TERM, 1882.

THE DISTRICT OF COLUMBIA,
Plaintiff in Error,

vs.

CHARLES H. ARMES,
ADMINISTRATOR OF EMORY W. DUBOSE, DECEASED,

Writ of Error from the Supreme Court of the District of Columbia.

Brief for Defendant in Error.

SHELLABARGER & WILSON,
A. A. BIRNEY,
CHAS. H. ARMES,
Attorneys for Defendant in Error.

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Writ of Error from the Supreme Court of the District of Columbia.

Brief for Defendant in Error.

The defendant's intestate, plaintiff in the court below, made the following case, in brief, by his declaration and by his proofs.

In 1873, the Board of Public Works of the District of Columbia caused the grade of the carriage-way on 13th street between F and G streets, N. W, Washington City, to be lowered several feet. The footwalk on the east side of 13th street was 36 feet wide (Rec., p. 24). This for a distance of 48 feet (Rec., 25), north from F street, was reduced in its whole width to the new grade; beyond that distance, only the outer twelve feet in width of the walk was cut down, thus leaving, at a point 48 feet from F street, "*a precipice in the pavement about two feet high, which projects some 24 feet from the building line, and stops at about 12 feet from the curb*" (Rec., 24). This place was "not guarded at all, neither on the side or at the end;" there was "nothing to prevent a person from falling down there"

(Rec., 24). From this precipice to the walk below there were three steps (Rec., 25).

On the night of February 21, 1877, Dr. E. W. DuBose, Contract Surgeon U. S. Army, a stranger in Washington, while walking down 13th street, from G street toward F street, stepped over this precipice. Striking upon his knees, he received a concussion of the spine, which resulted in partial paralysis, loss of power of locomotion, impaired mind and power of speech, and finally in his death, in July, 1880, after the judgment in the General Term in his favor.

Prior to this injury, Dr. DuBose was a very stout and robust man, of good habits, with no impediment in his powers of speech and locomotion, and of sound mind—a man of "more than ordinary physical capacity" (Rec., pp. 21–22).

ON MOTION TO DISMISS.

A motion to dismiss this case was filed in this court in November, 1880, but consideration of the motion was postponed until this hearing.

The motion was on two grounds:

1st. Want of jurisdiction.

2d. Want of an appeal bond.

For our argument on the motion to dismiss, we ask leave to refer to our brief filed on the motion in 1880.

The Merits.

As to the paper styled, "*Case and Bill of Exceptions*," it is no part of the record in the cause, and cannot be considered. It is neither an "agreed statement," a "special verdict," nor a "bill of exceptions."

It contains no statement of facts, proven or supposed to be proven, but sets out all the testimony, both oral and by deposition, all the instructions asked by both parties, whether they were granted or refused, and the entire charge of the court, no part of which was objected to by defendant.

This court has said—

> "A statement of facts in the form of a report of all the evidence, signed by the judge and called the case, is neither a bill of exceptions nor an agreed statement of facts, *and is no part of the record in the case.*"
> *Suydam* vs. *Williamson et al.*, 20 How., 427.

This court will not pass upon even an agreed statement, which sets out *evidence* only, and fails to state the facts which that evidence proves or tends to prove.

> "The statement must be sufficient in itself, without inferences or comparisons, or balancing of testimony or weighing evidence to justify the application of the legal principles which must determine the case. It must leave none of the functions of a jury to be discharged by this court, but must have all the sufficiency, fullness and perspicuity of a special verdict. If it requires of the court to weigh conflicting testimony, or to balance admitted facts, and deduce from these the propositions of fact on which alone a legal conclusion can rest, then it is not such a statement as this court can act upon."
> *Burr* vs. *Des Moines Co.*, 1 Wallace, 99.

An examination of the document in question will show it to be open to all the objections suggested by the court in the opinion quoted. It contains "evidence of facts and not the facts themselves."

See, also, *Pomeroy's Lessee* vs. *Bank of Ind.*, 1 Wall., 592;
Thompson vs. *Riggs*, 5 Wallace, 663.

It was said by this court in the case of the Francis Wright that such an objection "is *fatal* to the bill of exceptions." The court say, after noticing one objection:

> "There is another equally fatal objection to this bill of exceptions. An evident effort has been made here, as it has been before, to so frame the exceptions as, if possible, to secure a re-examination of the facts in this court. The transcript which has been sent up contains the pleadings and all the testimony used on the trial below."
> 105 U. S., at p. 389.

This is precisely the condition of the transcript in this case. This is clearly an attempt to secure a review of *alleged errors of the jury, to have a finding by this court on the evidence as reported upon every fact found by the jury in this case.*

The Exceptions.

But if the court should decide to treat this paper as a bill of exceptions, then we urge that it contains nothing which the court will consider.

1. There is no exception to the judge's charge to the jury nor any part thereof.

2. There is no exception to the instructions given.

3. But one exception was taken to the refusal of the court to grant the series of five instructions prayed by defendant.

This court has held, where the entire series of propositions was presented as one request, "if any one proposition was unsound, an exception to a refusal to charge the series cannot be maintained."

Beaver vs. *Taylor*, 93 U. S., 46;
R. R. Co. vs. *Horst*, Ib., 291;
Harney vs. *Tyler*, 2 Wall., 328;
Johnson vs. *Jones*, 1 Black., 209.

All these propositions were erroneous.

The 5th proposition was that if the "plaintiff, when he met the ladies, voluntarily turned to the left, when he could as easily have turned to the right, and that in consequence of his turning to the left he continued on his way and fell off at the steps, then he cannot recover in this suit."

There is no law of the road as to foot passengers, and no authority to sustain this prayer.

Grant vs. *Brooklyn*, 41 Barb., 384;
Cotterill vs. *Starkey*, 8 C. & P., 691;

Lloyd vs. *Ogleby*, 5 C. B. (N. S.), 667;
Angell on Highways, Sec. 341.

This proposition is now conceded to have been erroneous (Appellant's brief, p. 2), and, in the assignment of errors, only the first two of these five propositions are brought to your notice.

THE 2D AND 3D OF THE ASSIGNMENT OF ERRORS—REFUSAL TO TAKE THE TESTIMONY OF THE PLAINTIFF FROM THE JURY.

The first prayer asks the court to take the testimony of the plaintiff from the jury, because his mental faculties are so far impaired as to disqualify him as a witness.

This prayer was refused, because, in the opinion of the trial-judge the plaintiff was not so far affected by mental disorder as to render him incompetent to testify. This is assigned as error; but we submit it was not error. Upon this *fact* the decision of the trial judge is conclusive, and no exception can be predicated upon that decision.

The appearance and manner of the plaintiff in court and his answers to questions on the direct and on cross-examination were not such as to suggest an objection as to his competency. The objection was not made until it appeared, later in the trial, that he bad been treated for mental disorder; and we submit that the admission on page 4 of the the brief of counsel for the District—*that the question could not have been made sooner than it was*—is, veiwed in this aspect, quite to the point.

In *Commonw.* vs. *Hills*, 10 Cushing 530, cited by plaintiff in error, it is expressly ruled that the question sought to be raised on this prayer is not the subject of exception. The court say: "The question whether a person is or is not an atheist, and so an incompetent witness, is *a question of fact for the presiding judge alone, and his decision is not open to exception.*"

So held also in *Dole* vs. *Thurlow*, 12 Metc., 159.

The reasonableness of this rule is apparent, for this court can neither see nor hear a witness, and is without the means to determine his mental condition.

This objection counsel for plaintiff in error seeks to avoid by bringing here a report of all the evidence taken on the trial; but this does not meet the difficulty nor aid him.

The case relied upon in the brief as justifying a review of such a question by an appellate court is *Dole* vs. *Thurlow*, 12 Metc., 159, which holds the decision of the trial judge in that case to have been conclusive, but declares that a judge *may if he think proper reserve the question of fact* as to competency for the whole court.

But this was not done in the case at bar. Justice Cox reserved nothing for the court in banc to determine, but *decided the point* and declared the witness competent; but as to the value of his testimony, that was expressly left to the jury. No decision can be produced which holds that this court or any appellate court acting under the common law can review such a decision. None of the cases cited by counsel for plaintiff in error are to that effect.

But no one can read the testimony of Dr. Godding (Set out on p. 7 of plaintiff's brief) and declare Dr. Du Bose to have been, at the time he testified, within the classes of prohibited witnessess. He was not a lunatic, a madman or an idiot. *Livingston* vs. *Hermania*, 10 Johns, 362. His testimony was to be received with care, and as to this, the learned judge sufficiently charged the jury when he said, (p. 31) "of course the testimony of the plaintiff is to be taken with some allowance considering his condition of mind."

The argument urged is, that a person of confessedly disordered mind is in all cases incompetent to testify; but this is not the law, for although it was once thought that an idiot or lunatic was incompetent to give evidence, it is now settled that either may be a witness, if, in the discretion of

the court he appears to have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct answer to the questions put.

Kendall vs. *May*, 10 Allen, 59;
Campbell vs. *State*, 23 Ala., 44;
Holcomb vs. *Holcomb*, 28 Com., 177;
Wharton's Cr. Law, sec. 752.

Under any view, there was no error in this part of the case, and the court was right in his refusal to instruct the jury to disregard the plaintiff's testimony.

1 Saund. on Pl. & Ev., sec. 319.

The *third* prayer was, by its terms, made dependent upon the two preceding prayers, and will not be considered.

The *fourth* proposition was erroneous, and has not been made the subject of an assignment of errors.

4 As to the First of the Assignment of Errors—The Exceptions to Evidence.

Nor can the court consider the two objections to the questions asked witnesses (Rec., pp. 16, and 25.), because—

First. Neither of these questions is preceded by any statement of "ultimate facts or propositions which the evidence is intended to establish" (*Burr* vs. *Des Moines Co.*), and by which the court might determine the relevancy or competency of the questions.

Second. There is no ground given for the objection to any question.

In "*The Francis Wright*" (cited) this court say, at page 389, the bill of exceptions ought "to show the grounds relied on to sustain the objection presented, so that it may appear the court below was properly informed as to the point to be decided." Where a deed was objected to in the Circuit Court, but *no specific grounds of objection were made*,

this court cannot inquire into the correctness or incorrectness of the objection.

Thomas vs. *Lawson*, 21 How., 337–8;
Camden vs. *Doremus*, 3 How., 515;
Kelly vs. *Jackson*, 6 Peters, 622;
Powell on Appellate Proceedings, pp. 122, 124;
Ex-parte Crane, 5 Peters, 197.

But if the court deems that it can consider the objections to evidence, then we submit that they are without merit.

1st. This proof was admissible, *first*, as tending to prove the dangerous condition of the thoroughfare, and, *second*, to fix upon the corporation notice of the defect.

The text-books cited on the brief of counsel for plaintiff in error are not against us on this point. The doctrine they announce is not in conflict with our position. As to the cases cited, the New Hamphire case has been expressly overruled in an able and elaborate opinion.

Darling vs. *Westmoreland*, 52 N. H., at p. 415.

The Massachusetts cases are not analagous in their facts: They have been reviewed by courts in several States, and they are not sustained in any instance. On the other hand, the courts of Illinois, Indiana, Georgia, and New York have admitted such testimony in cases closely analagous in their facts to the case at bar, as the best evidence that the nature of the case admits of.

Quinlan vs. *Utica*, 11 Hun. (N. Y.), 217;
Same case, affirmed, 74 N. Y., 603;
Darling vs. *Westmoreland*, 52 N. H., at p. 415;
Chicago vs. *Powers*, 42 Illinois, 169;
Delphi vs. *Lowery*, 74 Indiana, 520;
Augusta vs. *Hafers*, 61 Georgia, 48.

It is established that in suits against railroad companies for causing fires, evidence that other fires at other times and places were caused by defendant's engines is admissible.

Grand Trunk R. R. Co. vs. *Richardson*, 91 U. S., 454.

In consonance with the doctrine of the cases above cited, it has been repeatedly held, in suits for setting up structures which frightened horses, that proof that other horses were frightened at other times by the same structure was admissible.

House vs. *Metcalf*, 27 Conn., 630;
Calkins vs. *Hartford*, 33 *Ib.*, 57;
Darling vs. *Westmoreland*, 52 N. H., 401;
Hill vs. *R. R. Co.*, 55 Maine, 439;
Kent vs. *Lincoln*, 32 Vermont, 591.

In Alabama, evidence of this kind is declared to be the most satisfactory that can be offered.

Mobile vs. *Ashcroft*, 48 Ala., 15;
S. C., 49 *Ib.*, 305.

The testimony in the case at bar was offered for the purpose of showing the dangerous condition of the street (Rec., 16), *and notice;* and

It is always necessary to prove notice to the corporation of the defect complained of.

Prideaux vs. *Mineral Pt.*, 43 Wis., 522.

2d. When the objection is general, as in this case, if the evidence is admissible for any purpose, the objection will not be sustained.

Kelly vs. *Jackson*, 6 Peters, 622.

3d. But if this court should decide evidence of other accidents at the place where plaintiff fell to have been incompetent, yet, since it was offered for the purpose only of showing the dangerous condition of the street and notice, and as these facts were sufficiently proven by other and unobjectionable testimony, and *there was no evidence to the contrary*, the error is *immaterial*, for improper admission of evidence is no ground for disturbing a verdict when there was sufficient competent evidence to sustain it.

Hilliard on New Trials, 415–417;
43 Pa. St., 120;
6 Cowen, 449;
6 Ind., 23;
6 Allen, 260;
Lucas vs. *Brooks*, 18 Wall., p. 454.

But this court will not go through the evidence to ascertain what was proved. The objection above taken, that there is no statement of facts preceding the questions objected to, is applicable here, and is fatal to the proposed inquiry.

4th. But we go farther: Testimony not objected to *and uncontradicted* showed a precipice across the pavement about two feet high and twenty-four feet wide, which "was not guarded at all," "nothing to prevent a man from falling down there." (Rec., 24.) This was supported by the testimony of one of defendant's witnesses. (p. 25.)

There was a gas-lamp 48 feet from this point, (Rec. 25) but at the time of this accident *it was not lighted.* (Rec. 20.) "The place where he fell was dark." (Rec., 16.)

On this evidence it would have been proper for the court to *instruct the jury as a matter of law that the place was dangerous.*

Prideaux vs. *Mineral Point*, 43 Wis., 513;
Chicago vs. *Gallagher*, 44 Illinois, 295;
Alger vs. *Lowell*, 3 Allen, 402.

This court has held, "If an area is left open it is dangerous, and is a nuisance and can be abated."

Chicago vs. *Robbins*, 2 Bl., p. 424.

It therefore appears that proof of other accidents, to show the place was dangerous, was unnecessary, and worked no injury to the defendant. It having thus become immaterial in the course of the trial, its admission cannot be assigned as error.

Greenleaf vs. *Birth*, 5 Peters, 132.
Lucas vs. *Brooks*, 18 Wall., 454.

The fourth assignment of error is that the damages are excessive.

This court will not examine that question.

R. R. Co. vs. *Fraloff*, 100 U. S., 31;
Miles us. *U. S.*, 103 U. S., 313.

On all the points the judgment should be affirmed.

SHELLABARGER & WILSON,
A. A. BIRNEY,
CHAS. H. ARMES,
Attorneys for Defendant in Error.

In the Supreme Court of the United States.

THE DISTRICT OF COLUMBIA, Plaintiff in error, *vs.* CHARLES H. ARMES, Administrator of E. W. DuBose, deceased, defendant in error.	October term, 1880. No. 869.

BRIEF FOR DEFENDANT IN ERROR,

ON

MOTION TO DISMISS AND TO AFFIRM.

MOTION, AND NOTICE THEREOF, TOGETHER WITH ACCEPTANCE OF SAME, BY SOLICITOR FOR PLAINTIFF IN ERROR.

SHELLABARGER & WILSON,
Solicitors for Defendant in Error.

MOTION.

In the Supreme Court of the United States, October Term, A. D. 1880.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,
vs
CHARLES H. ARMES, ADMINISTRATOR OF EMORY W. DuBOSE, deceased, defendant in error.
No. 869.

And now comes the said Charles H. Armes, administrator of the said Emory W. Du Bose, deceased, and moves the court to dismiss this case for want of jurisdiction in this court, and to affirm the judgment of the court below. Said motion to dismiss is based upon the following grounds, to wit: That the order and judgment of the Supreme Court of the District of Columbia, to reverse which this writ of error is prosecuted, is, in law and fact, not a final judgment, order or decree, and this court has not jurisdiction to review the same: That such judgment is not a final one, because, as appears by the record in this case, no appeal was taken from the judgment rendered at the special term upon the verdict of the jury, on the 13th day of March, 1880, but on the contrary the only appeal which was ever noted or taken from the court in special term in which said judgment on the merits was rendered, to the said supreme court in general term, was, as appears by the record, an appeal from the order of the court in special term *overruling* the motion of the defendant below—the plaintiff in this court—for a new trial on the ground of excessive damages.

And the said supreme court in general term had no jurisdiction to consider, try or decide general merits of said cause, or any other question than the one so appealed; and the judgment of the supreme court in gen-

eral term, is, therefore, without regard to its form, not a final judgment on the merits of said cause, and is nothing other or more than an order affirming the order of the court below overruling the motion for a new trial.

And because no appeal bond has been filed as required by law.

And the court is moved to affirm said judgment because the only question presented in the record, is as to the ruling of the court below upon a motion for a new trial upon the sole ground of excessive damages: And because it is manifest that the appeal was taken for delay only, and that the questions presented are too frivolous to need further argument than such as can be submitted on this motion.

SHELLABARGER & WILSON,
Counsel for Defendant in Error.

Filed November 11, 1880.

To HON. A. G. RIDDLE,
Solicitor for Plaintiff in Error:

Take notice that on Monday, the 17th day of January, 1881, or as soon thereafter as counsel may be heard, the above motion will be called up and submitted to the court.

SHELLABARGER & WILSON,
Solicitors for Defendant in Error.

Service accepted this 23d day of December, 1880, of the above motion and notice, with copy of brief of counsel for defendant in error.

A. G. RIDDLE,
Solicitor for Plaintiff in Error.

Brief for Defendant in Error, on motion to dismiss, and to affirm.

The writ of error was to the Supreme Court of the District of Columbia.

Statement of Case.

This was an action at law for damages for personal injuries occasioned through the negligence of the District of Columbia in making and maintaining in the footway of a public street in Washington City a dangerous precipice, over which the plaintiff below fell. (Rec., 1 to 5.)

The verdict was rendered March 2, 1880, for ten thousand dollars. (R., 8.)

On the same day the defendant moved as follows:

And now comes the said defendant and moves the court to set aside the verdict heretofore rendered in this cause and grant a new trial herein, and for reason it assigns the following, to wit:

1. For errors of law by the justice presiding in his rulings during the trial.

2. For errors of law by the justice presiding in his instructions to the jury.

3. Because the verdict was contrary to the evidence.

4. Because the damages assessed by the jury are excessive, and not justified by the evidence. (R., 8.)

March 13, 1880, the motion for a new trial was overruled; (R., 8,) and judgment was entered on the verdict.

By amendment of the minutes of the court, made on motion of the plaintiff in error, (R., 9,) the minutes show the following:

"March 13, 1880. This day in open court came the defendant, by its attorney, who noted an appeal from the decision of the court overruling its motion for a new trial on the ground of excessive damages." (R., 9.)

The record also contains the following:

"*Motion for new trial on exceptions. Filed April* 21, 1880.

In the Supreme Court of the District of Columbia.

E. W. DuBose
vs.
The District of Columbia. } At Law, No. 19,749

And now comes the defendant, by its attorney, and files

this, its motion for a new trial on exceptions, and notice of appeal from the decision of the court overruling the motion for a new trial noted upon the minutes of the court.

FRANCIS MILLER,

—(R., 8-9.) *Attorney for Defendant.*"

Upon consideration of the case by the court in general term, the judgement of the court was entered as follows:

"Now again come here as well the plaintiff as the defendant, by their respective attorneys, and because it appears to the court here that there is no error either in the record and proceedings or in the judgment of the court, therefore it is considered by the court that the said judgment be, and the same is hereby, affirmed, the defendant's motions for a new trial upon exceptions notwithstanding, and that the plaintiff have execution of his said recovery, with costs to be taxed by the clerk." (R., 32.)

After the record was filed in this court the death of the plaintiff below was suggested, and his administrator was made a party to the record.

Argument.

That the appeal to the general term was from the order overruling the motion for a new trial, (R., 8,) and was not an appeal from the judgment itself, (R., 8,) see the following:

1. The motion to amend the record so as to show that an appeal was taken 13th of March, 1880, expressly states that the notice so given on the 13th was notice of appeal from the order refusing a new trial (R., 9,) on the ground of excessive damages.

2. The entry made (R., 9.,) amending the record under this motion expressly states that the appeal noted by the defendant was from the order overruling the motion for a new trial.

3. In the motion for a new trial it is expressly stated

that such motion is on exceptions and notice of appeal from the overruling of the motion for a new trial. (R., pp. 8–9.)

4. It was perfectly competent for the defendant to take such appeal from said order overruling the motion for a new trial as distinct from the appeal from the judgment on the merits, and have it reviewed in a general term, (provided the facts proved be stated in a "case," 2 McA., 48,) because such appeal from the order overruling the motion for new trial is separately and expressly authorized and its method regulated by section 805, whereas the general appeal is authorized by section 772. Rev. Stats. D. C.

5. Section 804 specially authorizes the justice who tries a case to enter on his minutes, (at his discretion,) a motion for a new trial upon exceptions or for excessive damages, &c., and section 805 authorizes an appeal from the order regarding the new trial and requires a bill of exceptions to be made up for the purposes of this special appeal under section 805. The record shows that the requirements of these two sections are the ones, if any, here followed, and no other.

6. That this record presents a case of appeal from the decision overruling the motion for a new trial authorized by section 804, and not the proceedings regarding the new trial covered by section 806, is of course evident from the fact that the latter motion can only be heard in general term, which this was not. See these sections expounded in Pabst vs. B. & O. R. R. Co., 2 McA., 48; also Thompson vs. Riggs, 5 Wall., 663.

7. It will be carefully observed that the appeal noted by said amendment of the record was by such amendment not only defined and confined as one from the order refusing a new trial, but was further defined as one confining the scope of the objection to the refusal of a new trial to the point that the damages were excessive. The appeal

therefore confined itself to the question, *were the damages excessive?*

It is therefore expressly settled by this record and by the statute that the defendant could take an appeal to the general term from the order refusing a new trial, and from this, separately and distinctly from an appeal from the judgment; that it did take such an appeal in this case, and not one from the judgment on the merits.

This being so, we submit that the general term had before it, if anything *properly*, no cause or question except the one made by the motion for a new trial and disposed of by the order of the trial-justice under section 804 overruling it, and appealed from under section 805, to wit: Was the damage excessive? This alone was appealed. (R., 9.)

Our proposition on this point is accurately stated in the case of Sparrow vs. Strong, 4 Wall., 584.

What is there decided is stated in the syllabus thus:

"This court will not take jurisdiction of a judgment shown by the context of the record to be but an order affirming a refusal of a court below to grant a new trial; even though the language of the record of affirmance brought here by the writ of error purports to affirm generally the judgment of a court inferior to the affirming court, and the only judgment, in strict language, in the record of such inferior court, is a general judgment."

The present case is, we submit, conclusively ruled by the case of Sparrow v. Strong, because here as there the context of the record shows the judgment could be nothing more in the general term than an order affirming the only thing which was appealed, to wit, the order affirming the refusal of a new trial.

Again we submit that the case of Brown vs. Wiley, 4 Wall., 165, rules this case. It involved the same statutes on which the present case is based and this court dismissed it for want of jurisdiction, the thing brought up by the

appeal being no final judgment, but only an order overruling a motion for a new trial.

It is well settled that this court cannot re-examine such a question on a writ of error. See Railway Co. vs. Twombly, 100 U. S., 78.

Should the court be of opinion that this case is one coming within the rule of practice applied by this court in the case of Fant vs. Gordon et al., decided at this term, then, we ask an affirmance of the judgment below as was done in that case.

SHELLABARGER & WILSON,
Solicitors for Deft. in error.

17-579
JAN 14 1881
JAMES H. McKENNEY, Clerk

Supreme Court of the United States.

THE DISTRICT OF COLUMBIA, Plaintiff in Error, *vs.* CHARLES H. ARMES, Administrator of E. W. DuBose, deceased.	No. 869.

Supplemental Brief of Attorneys for Defendant in Error, on motion to dismiss.

The paper filed in the case *April* 21, 1880, (R. 8-9,) is of no effect.

Because, 1st. It was not filed within the time prescribed by the rules of the court below.

2d. It was not filed in the court in general term.

1st. The court below is empowered by statute to regulate, *by rule*, the *time* for taking appeals to the general term, as follows:

Sec 770. "The Supreme Court, in general term, shall adopt such rules as it may think proper to regulate the time and manner of making appeals from the special term to the general term, and may prescribe the terms and conditions upon which such appeals may be made, and may also establish such other rules as it may deem necessary for regulating the practice of the court, and from time to time revise and alter such rules. It may also determine by rule what motions shall be heard at a special term, as non-enumerated motions, and what motions shall be heard at a general term in the first instance." (Rev Stat. D. C., p. 92.)

Rule 91 of the court below provides that

"No order, judgment or decree of any of the courts held by a single justice of this court shall be reviewed in the general term unless the appeal be taken and perfected within thirty days after the order, judgment or decree complained of shall have been made or pronounced," &c. (Certified copy filed herewith.)

The judgment of the special term was made and pronounced March 13, 1880, (R 8.) The last day for filing said paper would, therefore, have been April 13, but it was not filed until April 21—eight days after the time had expired.

2. The paper filed April 21 was not filed in the general term. On that date, and as late as May 10, 1880, when a motion was filed in the special term to amend the minutes, (R. 9,) the case was in the special term. And, it was not until May 10 that the "case and bill of exceptions," (so styled,) was signed by the trial justice: (Rec. 31.) Hence, there was not *in point of fact* anything in the nature of, or purporting to be, a bill of exceptions in existence on April 21.

Not only is the motion which appears of record (p. 8–9) of the 21st of April of no legal effect because filed eight days after the time had expired during which it could be filed, but it is a paper thrust into the case by simple filing in the clerk's office without leave or other action of the court, and the court in general term never acted upon it, because the reference of the court to the motion for a new trial in its order, (R. 32,) is in its language as applicable to the motion for a new trial made 2d of March (R. 8) as to the one of 21st April, and as that of the second of March is the only motion for a new trial which was lawfully in the case, it will be presumed that this motion of March 2 is the one referred to in the court's order of June 21. (R. 32.)

No motion, to be heard in the general term in the first instance, was made or filed.

SHELLABARGER & WILSON,
Solicitors for Defendant in Error.

I am content the case be heard on this brief on next Monday, Jan'y 17.

RIDDLE, *for Pl'ff.*